

COMPLIANCE BOARD OPINION NO. 94-6

August 16, 1994

Mr. Andrew J. Scott

The Open Meetings Compliance Board has considered your complaint dated June 13, 1994, in which you allege a violation of the Open Meetings Act in connection with a meeting on June 7, 1994, of the County Commissioners of Charles County.¹ This meeting was apparently a day-long work session to consider the county's budget and tax rates. This work session was open to the public.

Your complaint asserts that the president of the Commissioners "called for a break of the work session at 3:45 p.m. to last 15 minutes. During the break, [President] Middleton and Commissioners Murray, Levy, Robert Fuller and Chriss Winston met in Middleton's office. The commissioners reconvened for the work session in the Commissioners' Meeting Room at about 4:20 p.m. From a couch in the reception area of the Commissioners' Wing, I observed the commissioners leaving Mr. Middleton's office at 4:15 p.m." When you asked President Middleton what had occurred in his office during the break, "Mr. Middleton's response was that the commissioners were 'exchanging thoughts on the budget worksession.' He added that the door to his office had been opened and that I could have 'listened in.'"

According to your complaint, Commissioner Fuller said that "the commissioners were 'just shooting the breeze.'" Commissioner Winston, you report, told you later that she had arrived in President Middleton's office after three other commissioners had been there for some time. During the five minutes that she was there, "Mr. Levy discussed a proposal to adjust the county's estimated revenues for the coming fiscal year, she said. She then suggested to the other commissioners that the discussion should probably be held in public. The commissioners then moved back to the Commissioners' Meeting Room, she said."

In a timely response on behalf of the County Commissioners, County Attorney Roger Lee Fink acknowledged that the topic of the work session itself was a "quasi-legislative function," and therefore the Open Meetings Act applied to the work session. But the Commissioners deny that any violation of the Act occurred in connection with the break during the work session.

¹ Your complaint identified the meeting as having taken place on June 8. In their response, the County Commissioners point out that the meeting in question occurred on June 7, rather than June 8. In this opinion, we shall refer to the June 8 meeting.

Mr. Fink points out that, just prior to the break, the Commissioners had "engaged in an amplified and robust debate, conducting their discussions in an upright, standing position. After 10-15 minutes of intense argument over, principally, revenue projections, the group dynamic necessary to reach consensus and reasoned decisions had deteriorated to a point where the president of the Commissioners called a break in the work session for 15 minutes." Mr. Fink points out that breaks taken during meetings of the Commissioners typically take longer than the announced time, because the Commissioners use the opportunity of a break to return to their respective offices to place telephone calls or attend to other individual matters. That practice was followed at the beginning of the break in the June 7 meeting and accounts for the actual duration of the break, in excess of the announced 15 minutes.

Of critical importance to the legal analysis is how a quorum of the Commissioners came to be in President Middleton's office and what they did when they were in there. Two of the Commissioners "began having a personal conversation to ease the lingering tensions from the work session and to re-establish inter-personal communications and relationships. They continued their personal conversation and entered Commissioner Middleton's office, indicating to Commissioner Middleton that they were to resume the work session." Although a quorum was now present, the Commissioners assert that nothing more than "shooting the breeze" occurred. A bit later, a fourth Commissioner, Commissioner Speake, came to President Middleton's office, and the four waited for their colleague, Commissioner Winston, who had left the building on an errand. The Commissioners describe the ensuing discussion as follows:

While waiting for Commissioner Winston to return, there was some discussion of the anger and dissension exhibited at the work session prior to the break. Commissioner Middleton recalls that he mentioned to the other Commissioners a cautionary comment about not allowing the personal discussions regarding disagreements at the prior work session over revenue projections to drift into budget discussions [when] they reconvened. At about that time, Commissioner Winston returned to the building and was informed by a secretary that the Commissioners were in Commissioner Middleton's office. She joined the Commissioners and a general discussion transpired regarding what had happened in the work session before the break, what needed to be accomplished when they resumed the work session, *i.e.*, resolving the revenue projection dispute and setting the tax rates, and how to accomplish that goal, *i.e.*, working toward a decision with more reasoned and less robust debate.

When the discussions began to include comments about the particular matters which were the subject of the work session, Commissioner Winston said she believed the Commissioners should return to the Meeting Room and Commissioner Middleton directed the Commissioners to reconvene the work session in the Meeting Room, which was promptly accomplished. The Commissioners estimate that no more than five minutes could have elapsed from the time Commissioner Speake entered Commissioner Middleton's office and the time the Commissioners left Commissioner Middleton's office to return to the Meeting Room. The door to Commissioner Middleton's office, which opens to a reception/waiting/secretarial alcove, was open the entire time of the break.

For purposes of the Open Meetings Act, a "meeting" occurs when a quorum of a public body convenes for the "consideration or transaction of public business." §10-502(g). The Act does not apply, however, to a "chance encounter, social gathering, or other occasion that is not intended to circumvent [the Act]." §10-503(a)(2).

The Commissioners contend that "the congregation of Commissioners in President Middleton's office was not convened, and was not for the purpose of considering or transacting public business." Rather, it was an effort to repair the frayed personal relations that, while essential for the effective conduct of public business, are not the conduct of public business. Alternatively, the Commissioners contend, the gathering in President Middleton's office was not intended to circumvent the Act, as evidenced by the open door.²

The Compliance Board recognizes the frequent practice of public bodies to gather informally before a meeting, or, as here, during a break in a meeting. There is nothing intrinsically wrong with this practice, so long as it is not used as a cloak for the conduct of public business. At the same time, the Compliance Board deems it an impermissible circumvention of the Act for a public body to use a such an informal gathering as a device to script discussion at the following meeting, to set the agenda for discussion, or to discuss the merits of any matter that is to be dealt with at the meeting proper.

In the Board's view, at least most of what apparently occurred in President Middleton's office after a quorum of Commissioners had gathered was not subject to the Act. When people have been yelling at each other and then talk about how to have the debate in a calmer manner, that exercise in repairing frayed personal relations is not itself the conduct of public business.

² As Mr. Fink put it in his letter, "the reporter could have simply walked back and inquired if he thought public business was being conducted in a closed session."

The Compliance Board is concerned that the Commissioners, as they reported in their response, discussed "what needed to be accomplished when they resumed the work session" It is obvious to the Compliance Board that a discussion of this nature would lead inevitably to talk about the merits of that which is to be accomplished. It may well be, however, that this discussion ended quickly with the resolve to return to the Commissioners' Meeting Room, the only place where any discussion on the merits of the budget and on tax revenues should have been conducted.

In summary, the Compliance Board concludes that the gathering in President Middleton's office was not itself a violation of the Open Meetings Act. The Compliance Board is unable to express an opinion, based on the information available to it, whether any brief portion of the discussion so concerned the merits of the budget and tax issues as to violate the Act.³

OPEN MEETINGS COMPLIANCE BOARD

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³ If the discussion did cross the line, the fact that the door to President Middleton's office was open would be irrelevant. The setting was plainly such that members of the public were not, as a practical matter, able to attend the meeting in the President's office, if that is what it was.